IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 647 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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TRIKAMLAL MANILAL PATEL
Versus
UTTAR GUJARAT VIJ COMP. LTD.

Appearance :
MR BHARAT JANI for the applicant.
MR RC JANI for Opponent.
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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 20/03/2006

ORAL JUDGMENT

1. By filing this Revision Application under

section 115 of the Code of Civil Procedure, the petitioner herein has challenged the orders passed by the executing Court below Exh. 1 and order dated 7.4.1998 below exh.25 both in Regular Darkhast No. 19 of 1997.

2. Gujarat Electricity Board instituted a suit, being Civil Suit No. 70 of 1990, against one Patel Manilal Nagardas for recovery of Rs.10,528-25 with interest at 15% p.a. Learned Civil Judge J.D., Sidhpur issued summons returnable on 26.4.1990. Ultimately, by judgment and order dated 15.1.1991, learned Civil Judge J.D., Sidhpur decreed the suit of the plaintiff with cost and interest at 12% p.a.

3.At this stage, it is required to be noted that the said Patel Manilal Nagardas expired on 26.4.1990, i.e. on the first returnable date. Yet, in paragraph 2 of the judgment and order passed by the learned trial Judge, it is observed that the defendant appeared and sought time often to file written statement and the Court granted time in the interest of justice but the defendant has not filed any written statement, the suit was ordered to be proceeded ex-parte.

4. On the basis of the said decree, Execution Petition No. 19 of 1997 was filed by the Gujarat Electricity Board against the present petitioner, who is the legal heir of the original defendant Patel Manilal Nagardas. In the execution

proceedings, the present petitioner appeared before the Court on 10.3.1998 and sought time to file reply. On 24.3.1998, the applicant herein filed a reply to the Darkhast and also filed an application Ex.23 praying for stay of the Darkhast and for time to prefer appeal. On the said application Exh.23, the learned trial Judge passed the following order:

> “Heard the learned advocate for the parties. Looking to the facts of the case and application given, the stage of the reply of Darkhast has been closed on 30/10/98 and the matter was for hearing of plaintiff and on call learned advocate of defendant was absent. Hence the learned advocate for plaintiff was heard and order for jungam warrant has been passed. And the order passed on 24/3/98 is not appealable and the order has been passed and the application given by the learned advocate of defendant on default is not as per the provison of law. Hence the application is rejected.”

5. Thereafter, on 25.3.1998, the present petitioner appeared before the Court and filed an application pointing out that the Patel Manilal Nagardas expired on 26.4.1990, and the judgment and order dated 15.1.1991 being against dead person, is a

nullity and the execution proceedings is required to be stayed. The learned Judge rejected the application on the ground that the executing court cannot go behind the decree, and the order of issuance of jangam warrant cannot be cancelled. The trial Judge also found that heirs of the deceased were given ample opportunity to file reply but they have not filed any reply. The trial Judge also found that if the decree is passed against a particular person and if he is dead, his heirs are required to file appropriate reply in execution petition. The learned trial Judge rejected the application against which the legal heirs of deceased defendant Patel Manilal Nagardas has filed the present Revision.

6. When this Revision Application came up before a co-ordinate bench of this Court [Coram: C.K. Buch, J], the learned Single Judge observed as under in his order dated 6.10.2005:-

> “It appears from record that the respondent-Gujarat Electricity Board had filed a Suit for recovery, etc. against one Manilal Narandas Patel of village Kalyana, Tal.Sidhpur. The summons of the Suit was made returnable on 26th April, 1990. There is evidence on record which is found prima facie satisfactory that on that very day the defendant had expired. So obviously he could not have appeared

before the Court. Recording absence of served defendant, the Court proceeded with the Suit and passed a decree. In turn, the present proceedings are arising out of the execution petition filed by the respondent-Gujarat Electricity Board. The Executing Court while rejecting the say of the present petitioner has observed that at least the heirs of the deceased defendant, who were served prior to 26th April, 1990 ought to have approached the Court and could have defended the Suit by filing formal appearance.

It is simultaneously possible to observe that the Suit had proceeded against the dead person and the plaintiff had failed in joining the heirs of the deceased defendant as party defendants in the Suit. The heading of the judgment indicates that the heirs of the deceased defendant were not joined; probably till the date of judgment and decree.

In such a situation, the concerned responsible officer of the respondent-Gujarat Electricity Board is hereby directed to appear in person before this Court on the next date of hearing so that the matter, if possible, can be settled.

Without prejudice to the rights and contentions raised in the present petition, if the petitioner approaches the

respondent-Board for settlement and the proposal is made by the present petitioner, the respondent-Board may consider the proposal of the petitioner sympathetically and Mr.R.C.Jani, learned counsel appearing for the respondent-Board may intimate the Board accordingly.”

7. There is nothing on the record of this compilation to show what happened thereafter.

8. Be that as it may, reading the judgment of the executing Court, one gets an impression that the learned Judge is not aware about the legal position at all. When a decree is passed against a dead person, the same is a nullity and it has no effect in the eyes of law. The learned trial Judge has exhibited sheer ignorance of law by observing that the executing court cannot go behind the decree. The say of the applicant is that since the heirs of deceased Patel Manilal Nagardas were not brought on record, the decree cannot be executed against the applicant on the basis of such a decree, which is a nullity in the eyes of law. It is also required to be noted that since original decree was passed against a dead person, the execution petition against his heirs is not maintainable and such decree cannot be executed against the heirs as it is a nullity. The Honourable Supreme Court, in the case of Kishun @ Ram Kishun (Dead) Through Legal Heirs vs. Bihari (D) By legal Heirs, 2005 Supreme

Court Appeal Reporter (Civil) 723 has held that decree passed against a party who was dead, is obviously a nullity.

9. When a decree is a nullity and if the same is brought to the notice of the Court, the executing court cannot simply brush aside the same on the ground that it cannot travel behind the decree. There is no question of going behind the decree in examining whether the decree is against a dead person or not, and, if the defendant died during the pendency of the suit, whether his heirs were brought on record. It is not a case where the original defendant died after the hearing of the suit was concluded. In the aforesaid order of the learned Single Judge, it is also observed that there is primafacie evidence on record to suggest that on the first returnable date, the defendant expired. There is nothing on the record to show that the plaintiff had taken any steps to bring heirs of the defendant on record. In fact, the suit could be said to have been abated as the suit cannot be proceeded against a dead person. Therefore, the proceedings in the said suit cannot be said to be a valid proceedings. The learned Judge has committed an apparent error in coming to the conclusion that the executing court cannot go behind the decree. In the present case, there is no such case as the judgment and decree itself is a nullity. The trial Court ought to have atleast appreciated that if in the title the name of the

original defendant is mentioned, and the names of the heirs are not mentioned, the execution proceedings cannot go against a person who is not named in the judgment or who is not brought on record of the case. The only question raised in the application filed by the present applicant was whether the decree is a nullity and the said question was required to be decided by the court and deciding such a question cannot be said to be going behind the decree.

10. In the result, the impugned order below Exh. 1 in Regular Darkhast No. 19/97 and order dated 7.4.1998 below Exh. 25 in Regular Darkhast No. 19/97 are quashed and set aside. The matter is remanded to the executing court for passing appropriate order on the aforesaid applications submitted by the present petitioner. The executing court shall now first decide whether the decree is a nullity being passed against a dead person, and whether the execution proceedings filed against the present petitioner is maintainable or not. The executing Court shall consider the said applications afresh and pass appropriate orders within two months from the date of receipt of writ of this Court, in accordance with law and considering the observations made in this order.

11. Rule made absolute accordingly, with no order as to costs.

12. Registry to send the writ forthwith.

[P. B. MAJMUDAR, J.]

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